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CIVIL AND POLITICAL RIGHTS, INCLUDING QUESTIONS OF: INDEPENDENCE OF THE JUDICIARY, ADMINISTRATION OF JUSTICE, IMPUNITY

Report of the Special Rapporteur on the independence of judges and lawyers, Dato' Param Cumaraswamy, submitted in accordance with Commission resolution 2000/42

Addendum

Report on the mission to Belarus*

* The executive summary of this mission report is circulated, in all the official languages. The mission report itself, which is contained in the annex to the present document, is reproduced in the language of submission and in Russian only.

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Executive summary

The present report concerns a fact-finding mission to Belarus undertaken from 12 to 17 June 2000 by the Special Rapporteur on the independence of judges and lawyers, pursuant to the mandate contained in Commission on Human Rights resolution 1994/41 of 4 March 1994, as renewed for a further three years in resolution 2000/42 of 20 April 2000.

The issues examined by the Special Rapporteur can be summarized as follows:

(a) The state of the administration of justice and in particular the independence and impartiality of the judiciary;

(b) The 1996 referendum and its implications for the independence of the judiciary and the rule of law in Belarus;

(c) The system of legal education and qualification for admission to practise law;

(d) Allegations of threats, harassment and intimidation of judges and lawyers; and

(e) The compliance of Belarusian laws with international norms.

During the mission the Special Rapporteur met with government officials, including representatives of the Ministry of Foreign Affairs, the Ministry of Justice and the Presidential Administration. The Special Rapporteur also met with representatives of the Constitutional Court, the Supreme Court, the Higher Economic Court, the District Court and the procuracy. Various non-governmental organizations, representatives of bar associations, academics and private individuals were also consulted The Special Rapporteur's visit was confined to the city of Minsk.

The Special Rapporteur acknowledges that Belarus is a country in transition and suffers heavily from economic deprivation and the after-effects of the Chernobyl accident. However, the pervasive manner in which executive power has been accumulated and concentrated in the President has turned the system of government from parliamentary democracy to one of authoritarian rule. As a result, the administration of justice, together with all its institutions, namely the judiciary, the prosecutorial service and the legal profession, are undermined and not perceived as separate and independent. The rule of law is therefore thwarted.

The Government appears not to have any regard for its commitments to the international human rights treaties it has ratified, which have supremacy over domestic laws. The Constitution and all laws must be seen to be in accordance with international treaties that the Government voluntarily ratified. Further, article 8 of the Constitution, provides for the "supremacy of the universally recognized principles of international law".

The 1996 referendum on the Constitution

The Special Rapporteur is deeply concerned that the 1996 referendum proceeded contrary to the rule of law and in violation of the independence of the judiciary. The blatant disregard for the decision of the Constitutional Court that the referendum was only of a consultative nature

undermines the rule of law and the balancing role that the judiciary plays as the third arm of government. Decisions of the Constitutional Court are mandatory and the nullification of a decision is, in effect, an interference in the judicial process and contrary to principle 4 of the United Nations Basic Principles on the Independence of the Judiciary.

The parallel legislative powers given to the President by the constitutional amendment to legislate by decree in exceptional situations has lead to unbridled rule by presidential decree. The argument that such power to legislate is essential as the passing of laws through the parliamentary process takes a long time is untenable. It negates the very principle of the separation of powers, which is the core value for the rule of law.

The controversial 1996 Constitution must be reviewed and the excessive executive powers of the President removed. This will restore the balance of governmental power between the three arms of government, in accordance with the doctrine of the separation of powers. In particular, article 84 (11) of the Constitution, vesting in the President the power to dismiss the judges of the Constitutional Court, the Supreme Court and the Economic Court must be repealed. Further, article 101, vesting in the President legislative powers "in instances of necessity", must also be repealed. In this regard Presidential Decree No. 40 of 23 November 1999, Presidential Edict No. 289 of 1998 and similar repressive decrees must be repealed with retrospective effect and any damage done to anyone in the enforcement of these decrees must be compensated. In the case of Parliament delegating to the President the power to legislate under the first paragraph of article 101, such delegation must be circumscribed strictly in accordance with the requirements of the article. The executive must remain accountable to Parliament.

The Special Rapporteur is concerned about the removal from office of Justice Mikhail Pastukhov subsequent to the referendum. The ground specified in the Presidential edict for his removal from office is not provided for by article 18 of the Law on the Constitutional Court of the Republic of Belarus, which governs the early ending of the term of office of a constitutional court judge. Further, the procedure specified in that provision, i.e. that the removal be based upon a recommendation of the Constitutional Court and performed by the national Parliament was not respected. Further, the other asserted basis for removal, section 84 (11) of the Constitution, only permits the President to dismiss judges of the Constitutional Court in accordance with the law. The Special Rapporteur is of the opinion that the President had no power to remove Justice Pastukhov under the above-mentioned laws. The President's action also cannot be justified under article 146 of the Constitution, which requires the formation of the organs of power within three months of the present Constitution entering into force. The President specifically stated that the Constitution was only amended by the referendum, and that the changes did not amount to a new constitution.

The Special Rapporteur considers that Justice Pastukhov was removed without the appropriate procedural guarantees required by Belarusian law and principles 17 and 18 of the United Nations Basic Principles on the Independence of the Judiciary. Further, his removal represented a clear attempt by the President to determine the future composition of the court. Four other judges who did not resign from the court were reappointed to the bench of the court when it was formed again in January 1997.

The judiciary

Executive control over the judiciary and the manner in which repressive actions are taken against independent judges appear to have produced a sense of indifference among many judges for the importance of judicial independence in the system. Many appeared to be content with the flawed appointment, promotional and disciplinary procedures and service conditions. These procedures violate international and regional minimum standards for an independent judiciary.

Judges must be sensitized to the concept of judicial independence, its values and principles, for the full realization of human rights, democracy and sustainable development of the nation. To this extent judges should be given adequate training.

The existence of an independent judiciary requires not only the enactment of legal provisions to that effect but full respect for the independence of the judiciary in practice. The Special Rapporteur is of the view that the creation of an overseeing interdepartmental commission to monitor cases, or direct interference in individual cases by government officials constitutes inappropriate and unwarranted interference in the judicial process. The Government must abolish this commission.

The judicial selection process should ensure that candidates are selected on the basis of objective criteria, and should be seen by the wider public to do so, otherwise the independence of the judiciary will be compromised. The Special Rapporteur considers that the placing of absolute discretion in the President to appoint and remove judges is not consistent with judicial independence. The executive may be involved in the formal appointment process, but not in the selection, promotion or disciplining of judges.

The Special Rapporteur is particularly concerned about the procedure for appointing judges to the Constitutional Court. He considers that placing the power to appoint six of the Constitutional Court judges within the sole discretion of the President constitutes a threat to the independence of the court. There is no requirement in this selection process for the President to engage in consultations with members of the judiciary or the wider legal community in order to ascertain the most appropriate candidates. The procedure lacks transparency and is not based on clearly defined, publicly available criteria. The President also appoints the Chairperson of the Constitutional Court, who plays a role in nominating candidates for the other six judicial positions on the Constitutional Court. This further increases the President's influence over the composition of the court. The absolute nature of the President's role in the appointment of judges to the Constitutional Court means that this court cannot possibly be seen to be independent of the executive.

The Government must establish, by law, an independent judicial council for the selection, promotion and disciplining of judges in order to conform with principle 10 of the Basic Principles on the Independence of the Judiciary, paragraph 1.3 of the General Principles of the European Charter on the Statute of Judges 1998 and paragraph 3 of the Budapest Conclusions on the Guarantees of the Independence of Judges - Evaluation of Judicial Reform. The Special Rapporteur considers that only a judicial selection process by an independent judicial council can meet the twin requirements of impartiality and the appearance of impartiality.

The length of their tenure will play a decisive role in ensuring that judges are free to decide matters before them without any improper influences, inducements, pressures, threats or interference, direct or indirect, as too short a tenure will subject judges to pressures arising from the reappointment process. These pressures are amplified by placing the power of reappointment under the control of the executive, since the executive will frequently appear before the courts as a party or have an interest in the outcome of proceedings decided by the judges. The Special Rapporteur has previously concluded that a five-year tenure is too short to be consistent with judicial independence. Courts in other jurisdictions have expressed similar opinions.

As judges who are appointed on probation do not have the security of tenure that is so essential to ensure their independence, the system of appointing judges on probation and the award of permanent tenure should be under the exclusive control of an independent judicial council.

The substantial number of inexperienced judges compounds the problems associated with a short initial tenure. Many of the persons the Special Rapporteur met during the mission expressed concern that the significant numbers of inexperienced judges, their poor conditions of service and their dependence on the Government threatened the independence of the judiciary and exposed judges to pressure and opportunities for corruption.

The conditions of service of the judiciary are not adequately provided for by law. Their low salaries and their dependence for promotions and other minimal service conditions on the executive and the Presidential Administration compromise judges' ability to decide cases independently. Low salaries also expose the judiciary to opportunities for corruption. The judiciary should be assigned priority in the State budget. Although the Special Rapporteur realizes that Belarus is a country in transition suffering from severe economic problems, he points out that certain minimum standards are necessary for a State to be based on the rule of law. The Government must ensure that remuneration of judges and their conditions of service are adequate to maintain the dignity of their office, so as to enable them to dispense justice impartially.

The legal profession

Similarly, there is excessive executive control of the legal profession, particularly by the Ministry of Justice. Such control undermines the core values of an independent legal profession and the Basic Principles on the Role of Lawyers. Such control leads to abuses, resulting in allegations of harassment, intimidation and interference by the executive.

The Government should enable lawyers to form self-governing associations and refrain from excessive control of the profession. There is no objection to the formation of a single unified profession as provided for by legislation. However, the controlling power must be a body composed in its majority of practising members of the legal profession.

The Special Rapporteur is concerned about the targeting of certain advocates for the defence of their clients. The prosecution or threat of prosecution of advocates for professional activities contravenes principle 20 of the Basic Principles on the Role of Lawyers. The Special Rapporteur considers that the persecution of these advocates for their human rights related work

is a violation of the right to freedom of expression and a violation of principle 14 of the Basic Principles on the Role of Lawyers. Lawyers must be allowed to practise their profession without any harassment, intimidation, hindrance or improper interference from the Government or any other quarter. In this regard, the Government should take note of its obligations under principles 16, 17 and 18 of the Basic Principles on the Role of Lawyers.

The procuracy

The independence and integrity of the procuracy is also undermined by excessive executive control. This leads to serious allegations of prosecutions being commenced or failing to be commenced for apparent political reasons inconsistent with the United Nations Guidelines on the Role of Prosecutors.

The Government must ensure that the prosecutorial system complies with the Basic Guidelines on the Role of Prosecutors. Procurators must be sensitized concerning their duties and responsibilities through suitable training programmes.

Annex

REPORT ON THE MISSION TO BELARUS OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE OF JUDGES AND LAWYERS

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Introduction

1. The present report concerns a fact-finding mission to Belarus undertaken from 12 to 17 June 2000 by the Special Rapporteur on the independence of judges and lawyers, pursuant to the mandate contained in Commission on Human Rights resolution 1994/41 of 4 March 1994, as renewed by resolution 1997/23 of 11 April 1997, and further renewed for three years in resolution 2000/42 of 20 April 2000.

2. The Special Rapporteur has received numerous allegations concerning the undermining of the independence of the judiciary and the legal profession in Belarus, particularly since the referendum to introduce a new constitution in November 1996. In his report to the fifty-third session of the Commission on Human Rights, the Special Rapporteur reported on allegations of executive intimidation of the Constitutional Court (E/CN.4/1997/32, para. 77). In his report to the fifty-sixth session of the Commission on Human Rights, the Special Rapporteur expressed his concern regarding the "systematic government interference with the independence and impartiality of judges and lawyers in Belarus". (E/CN.4/2000/61, para. 51)

3. A negotiated Chairperson's statement made at the fifty-first session of the Sub-Commission on the Promotion and Protection of Human Rights indicated the willingness of the Government of Belarus to facilitate a visit by the Special Rapporteur. In the light of the seriousness of the allegations received, the Special Rapporteur sought, in a letter dated 11 October 1999, the consent of the Government of Belarus to undertake a visit to the country. By a letter dated 29 November 2000, the Government indicated its readiness to invite the Special Rapporteur, which was officially confirmed on 5 April 2000.

4. The issues examined by the Special Rapporteur can be summarized as follows:

(a) The state of the administration of justice and in particular the independence and impartiality of the judiciary;

(b) The 1996 referendum and its implications for the independence of the judiciary and the rule of law in Belarus;

(c) The system of legal education and qualification for admission to practise law;

(d) Allegations of threats, harassment and intimidation of judges and lawyers; and

(e) The compliance of Belarusian laws with international norms.

5. The Special Rapporteur, during the course of the mission, met with the following officials inter alia: the Head of the Department of Humanitarian Cooperation and Human Rights of the Ministry of Foreign Affairs, Mr. Ogurtsov; the Deputy Procurator-General, Mr. Alexander Vladimirovich Ivanovski; representatives of the Ministry of Justice, including the First Deputy Minister of Justice, Mr. Victor Grigorevich Galavanov, and the Deputy Minister of Justice, Mr. Alexander Sergeevich; the First Deputy Chairman of the Supreme Court, Mr. Peter Petrovich Miklashevich; judges of the Minsk Frunze Region Court; the Deputy Chairman of the Constitutional Court, Mr. Alexander Vladimirovich Maryskin; the First Deputy

Chair of the Higher Economic Court, Mr. Victor Sergeevich Kamenkov; the Deputy Minister for Foreign Affairs, Mr. Vladimir Nikolaevich Gerasimovich; the Deputy Head of the Presidential Administration, Mr. Alexander Michailovich Abramovich.

6. The Special Rapporteur met with representatives of the Organization for Security and Cooperation in Europe (OSCE), Mr. Hans Georg Wieck.

7. The Special Rapporteur also met with representatives of non-governmental organizations and with private individuals, including: representatives of the Belarus Helsinki Committee, Mr. Gari Pogonyalo, Mr. Mikhail Chigir, Ms. Julia Chigir; the Chairperson of the Belarusian Association of Women Lawyers, Ms. Galina Drebizova; the Chairperson of the Republican Bar Association, Ms. Natalya Iosefovna Andryechik; the Deputy Chairperson of the Republican Bar Association, Ms. Tatiana Matysevich; the Chairman of the Minsk Bar Association, Mr. Valeri Alexevich Mitrofanov; the Dean of the Faculty of Law, Belarusian State University, Mr. Valery Gogunov; the Central and East European Liaison Initiative (CEELI) of the American Bar Association, Ms. Cynthia Alkon; Mr. Obodovsky, Ms. Uelskaya, Ms. Shelmakova, regional labour union lawyers from Minsk, Soligorsk and Mogilev; the Chairman of Ratusha, Mr. Alexander Milinkievich; the Director of the Law Centre for Media Protection, Mr. Mikhail Pastukhov; the Chairman of the Centre for Constitutionalism and Comparative Legal Studies, Mr. Alexander Vashkevich; representatives of Viasna 96; Ms. Antonina Turmovich, a private notary; the Vice Director for Juridical Issues of the Belarusian Union of Entrepreneurs and Employers; Ms. Vera Stremkovskaya, Centre for Human Rights; Mr. Oleg Volchek and Ms. Olga Zudova, Legal Assistance to the Population.

8. The Special Rapporteur also met with the United Nations Resident Coordinator and representatives of the United Nations office in Belarus.

9. The Special Rapporteur visited the city of Minsk during the course of his mission.

10. At the end of the Special Rapporteur's mission, a press conference was held to discuss the preliminary conclusions of the mission and his particular areas of concern.

11. The Special Rapporteur would like to thank the Government of Belarus for its invitation to visit the country and for organizing and providing assistance during the mission.

I. GENERAL BACKGROUND

12. Belarus declared its independence from the Soviet Union on 25 August 1991. A new Constitution was adopted in March 1994 which guaranteed a democratic form of government, based on the rule of law and the separation of powers, with a president directly elected as head of Government and State. In July 1994, Alexander Lukashenko became the first democratically elected president. After several rounds of voting, the deputies to the 13th Supreme Soviet, the national Parliament, were elected in 1995.

13. Since the election of Alexander Lukashenko, there has been a substantial consolidation of power in the Office of the President. In May 1995, a referendum was held that approved the right of the President to dissolve Parliament if it violated the Constitution. In November 1996,

several amendments to the 1994 Constitution were adopted after a procedure which was widely considered to be illegal and unconstitutional (see sect. II). The referendum proceeded contrary to a ruling of the Constitutional Court, of 4 November 1996. Under the new Constitution the old parliament, the Supreme Soviet, was replaced by a bicameral Parliament. A 110-member Chamber of Representatives was formed, consisting of the members of the Supreme Soviet who supported President Lukashenko. A new 64-member Council of the Republic was also formed. Deputies of oblast (regional) level and Minsk City councils elect individuals to this chamber and the President appoints eight members.

14. The amendments introduced by the referendum have resulted in a prolonged political crisis, with many regarding the 13th Supreme Soviet as the legitimate parliament. Members of the international community, including the Council of Europe, the European Union and the OSCE Parliamentary Assembly, criticized the flawed referendum and do not recognize the legitimacy of the 1996 Constitution or the new parliament. Various opposition parties continue to dispute the validity of the amended constitution.

15. The consolidation of power in the office of the President has also corresponded with a marked decrease in respect for human rights. During the past few years, there have been thousands of detentions of representatives of the opposition, mass media and NGO communities in violation of their rights to freedom of expression and peaceful association. Protest marches were organized in 1999 and 2000, again resulting in multiple arrests of protesters, journalists and opposition leaders. Several key opposition personalities also disappeared in 1999-2000. In October 2000, parliamentary elections were held but were not fully representative: many who wanted to participate were refused registration owing to strict and detailed registration requirements. Also, some opposition parties boycotted the election.

16. The Committee of State Security (KGB) and the Ministry of Internal Affairs (MVD), both subordinated to the head of State, remained the leading law enforcement and police organs, as well as the General Procurator's Office. Under President Lukashenko's direction, the Presidential Guard, initially created to protect senior officials, expanded its role and used force against the President's political opponents, with little judicial or legislative supervision. Members of the security forces also allegedly committed numerous human rights abuses.

17. Belarus has ratified the six main United Nations human rights treaties and has acceded to the Optional Protocol to the International Covenant on Civil and Political Rights.

II. THE NOVEMBER 1996 REFERENDUM ON THE CONSTITUTION

18. On 24 November 1996, the Republic of Belarus held a referendum to decide on extensive constitutional changes proposed by the President, Alexander Lukashenko. The President called the referendum after the Supreme Soviet refused to pass the suggested constitutional changes. The Agrarian and Communist factions of the Supreme Soviet also proposed an alternative constitution. The results of the referendum were not officially recognized by many States and international bodies, which declared the results to be illegitimate.

19. The referendum was marked by substantial irregularities in procedure. Although the referendum was officially to take place on 24 November 1996, advance voting started

on 9 November 1996. This advance voting was to allow Belarusian citizens who were going to be absent from Belarus on polling day, or for other exceptional circumstances, to participate in the election. However, reports suggest that up to 25 per cent of the population voted prior to 24 November 1996 and the Government actively encouraged the general population, through the mass media, to take part in the advance voting.

20. The Central Electoral Commission (CEC), the body responsible for elections, was not granted complete control over the conduct of the referendum. The ballots were printed by the Presidential Administration and the CEC was not informed how many were printed. Further, on polling day ballot boxes were not sealed, no identification was required from voters, multiple voting was allegedly common and observers and members of the opposition were denied access to polling stations. Copies of the proposed constitutional amendments were not available at polling stations until several days after voting began. On 14 November 2000, President Lukashenko dismissed the Chairman of the CEC, Victor Gonchar, after he stated that he would not certify the results of the referendum. This action was contrary to the Constitution, which gave exclusive authority to dismiss the Chairman to the Parliament.

21. On 4 November 1996, the Constitutional Court ruled that the proposed amendments to the Constitution could not be introduced through the referendum. The decision stated that the suggested changes amounted to a new constitution and therefore their introduction would be contrary to article 149 of the 1994 Constitution, which only allowed amendments or supplements. The court ruled that therefore the referendum would only be of a consultative nature. On 7 November 1996, President Lukashenko issued a decree annulling the decision of the court and declaring the results of the referendum binding. Prior to the decision of the court, President Lukashenko had reportedly threatened to "take measures" and "defend the people" if the Constitutional Court ruled that the referendum contravened the Constitution.[1]

22. On 19 November 1996, 73 members of the Supreme Soviet sent a request to the Constitutional Court for the impeachment of the President. The Special Rapporteur has learnt that after this procedure was initiated, President Lukashenko started to exert substantial pressure on those Members of Parliament (MPs) who had signed the request. This led to the withdrawal, under duress, of at least 12 signatures from the request for impeachment, taking the number required for an impeachment below the constitutional minimum.

23. On 26 November 1996, 106 deputies of the 13th Supreme Soviet signed a document of allegiance to President Lukashenko, validated the results of the referendum and declared themselves available to join the Chamber of Representatives, the lower house of the new bicameral parliament created by the referendum. The 13th Supreme Soviet, which continued to be recognized as the legitimate parliament by the international community, continued to sit until removed from the parliamentary buildings on 27 November 1996. The deputies who supported President Lukashenko drafted a law abolishing the old parliament and then formed the new Chamber of Representatives. The new Constitution was signed into force on 28 November 1996.

24. After the entering into effect of the new Constitution, six judges of the Constitutional Court submitted their resignation to the President, in protest over his actions. Four others who did not resign were reappointed to the new bench of the Constitutional Court. One judge,

Justice Mikhail Pastukhov, was forced from office by a presidential edict ending his term in office. As a result of his dismissal, Justice Pastukhov lost his entitlement to severance pay or a pension for the remainder of his life. In his meeting with the Deputy Chairman of the Constitutional Court, Mr. Alexander Vladimirovich Maryskin, the Special Rapporteur was told that this action was based upon articles 84 (11) and 146 of the amended Constitution. Article 84 (11) permits the President to dismiss a judge in accordance with the law and article 146 requires the President, Parliament and the Government to form the assigned organs of power within two months of the entering into effect of the Constitution.

III. THE ADMINISTRATION OF JUSTICE ACCORDING TO THE CONSTITUTION AND THE LAW ON THE "JUDICIAL SYSTEM AND THE STATUS OF JUDGES IN THE REPUBLIC OF BELARUS"

25. Subsequent to Belarus independence from the Soviet Union, the Supreme Soviet promulgated the Concept of Judicial and Legal Reform on 23 April 1992, to provide the basis for judicial reform. The Concept of Judicial and Legal Reform had several main goals, including: the creation of a legal system to support a State ruled by law; the establishment of an independent judiciary to guarantee the rights of citizens and ensure the effectiveness of laws; and the implementation of democratic principles that correspond with the norms of international law. The Law on the Judicial System and the Status of Judges in the Republic of Belarus (hereafter, law on the judicial system), which was adopted by the Supreme Council of Belarus on 13 January 1995, expands on that structure.

26. The Constitution of the Republic of Belarus, as amended by the disputed November 1996 referendum, contains several guarantees of rights associated with the administration of justice and establishes a broad structure for the judiciary. Article 2 of the Constitution provides that the attainment of the rights, freedoms and guarantees of the human being are the supreme goal of the State. Article 8 states that the Republic of Belarus recognizes the supremacy of the universally recognized principles of international law and undertakes to ensure that its laws comply with these principles. Section II of the Constitution contains substantial guarantees for the safeguarding of human rights, many of which correlate to those contained in international human rights instruments.

27. Section II contains the following articles that are relevant to the administration of justice:

(a) Article 25 states, inter alia:

"A person who has been taken into custody shall be entitled to a judicial investigation into the legality of his detention or arrest";

(b) Article 36 states, inter alia:

"Judges, employees of the Procurator's office, the staff of organs of internal affairs, the State Supervisory Committee and security organs, as well as servicemen, may not be members of political parties or other public associations that pursue political goals";

(c) Article 60 states, inter alia:

"Everyone is guaranteed protection of his rights and freedoms by a competent, independent and impartial court of law within a time period specified by law";

(d) Article 62:

"Everyone has the right to legal assistance to exercise and defend his rights and liberties, including the right to make use, at any time, of the assistance of lawyers and one's other representatives in court, other State bodies, local government bodies, enterprises, establishments, organizations and public associations, and also in relations with officials and citizens. In the instances specified in law, legal assistance is rendered from public funds.

Opposition to the rendering of legal assistance is prohibited in the Republic of Belarus."

28. Article 61 of section II also provides everyone with the right, in accordance with the international instruments ratified by the Republic of Belarus, to appeal to international organizations to protect their rights and freedoms, provided that all available domestic means of legal defence have been exhausted. Belarus acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, with effect as of 30 December 1992.

29. The judicial system in Belarus consists of the Constitutional Court and the general and economic court systems. The general court system consists of the district courts, the oblast and Minsk city courts, the Supreme Court and the military court system. The economic court system consists of the Higher Economic Court and the oblast and Minsk City economic courts.

30. At the time of the mission, the Special Rapporteur was informed that there were approximately 55 Supreme Court judges, 159 judges in 6 regional courts and the Minsk City Court, 678 regular and 185 administrative judges in 154 district courts. There are 20 judges in the Higher Economic Court, and 96 judges at the oblast level. The Constitutional Court consists of 12 judges.

A. The judiciary

1. Guarantees of independence

31. Article 6 of the Constitution provides for the separation of powers between the legislature, executive and judiciary. These State organs, within the limitations on their powers, are independent and act as a check and balance upon each other.

32. Chapter 6 of the Constitution governs the court system. Article 109 of the Constitution and article 1 of the law on the judicial system vest the exercise of the judicial power in the

courts. These articles also forbid the creation of exceptional courts. Article 110 of the Constitution and article 9 of the law on the judicial system guarantee that judges are independent and only subordinate to the law. Any interference in the administration of justice is prohibited and punishable by law.

33. Article 64 of the law on the judicial system provides:

> "Exerting influence of any form upon a judge with the aim of hindering the full, thorough and objective consideration of a particular case or of securing an unlawful judgement, sentence, ruling or order shall render the culprit liable to criminal proceedings under the legislation of the Republic."

34. The 1994 Law of the Republic of Belarus on the Constitutional Court of the Republic of Belarus contains specific provisions regarding the independence of the Constitutional Court. Article 2 provides, inter alia:

> "The Constitutional Court shall be independent in the exercise of its functions. Any form of pressure on the Constitutional Court or its members in connection with constitutional supervision shall be prohibited and liable to prosecution under law."

35. The law on the Constitutional Court, in article 24, also requires that sufficient funding be provided to the court to ensure the independence of legal proceedings. Further, the court is entitled to independently acquire information, facilities and personnel required for its activities.

36. However, these guarantees of independence are systematically undermined by the Government's and, in particular, the President's attitude to the judiciary. In 1996, the President is reported to have stated that: "Under the Constitution, the judiciary is in essence part of the Presidency. Yes, the courts are declared to be independent, but it is the President who appoints and dismisses judges. Thanks to this, it is easier for the President to pursue his policies through the judiciary."

37. Further, on 5 December 1997, in a speech to the Congress of Judges of the Republic of Belarus, President Lukashenko declared: "We have been watching what rulings judges made when the tax agency went to court. We will make the final analysis, and if there are unsatisfactory rulings not in favour of the State, we will take respective measures according to the legislation."[2]

38. On 30 May 2000, as part of the "public political dialogue", a government organized dialogue between the Government and other political and social forces within Belarus, the President stated that the sentence passed in the case of former Prime Minister, Michael Chigir, had resulted from a compromise between the OSCE and the Belarusian authorities. President Lukashenko stated: "On your instructions, if you want, as a result of your pressure, although I do not welcome it your client was forgiven a lot." Further, that if it was not for this, Mr Chigir would have received a sentence of "at least five years, first in a cell, then somewhere in a prison". Such an agreement was denied by the OSCE.

39. In July-August 2000, the President established by decree an interdepartmental commission to monitor high profile criminal cases and to issue findings with respect to them, prior to a judicial determination of the matter. The commission also investigates cases of alleged disappearance. The members of this body include the President of the Supreme Court, the President of the Higher Economic Court, the Head of the State Prosecutor's Office and the Head of the Ministry of the Interior and of the KGB. It is chaired by the Ministry of the Interior and its deliberations take place in secret. It exists contrary to provisions regarding the investigation of offences and clearly interferes with a judge's determination of the case on the basis of evidence placed before the court. The Special Rapporteur has received information alleging that President Lukashenko, at a meeting of this commission on 30 August 2000, stated that "when the Head of State takes a criminal case under his control, he bears responsibility for it, for the investigation and, it would be wrong to deny it, for the outcome of the judicial proceedings".[3]

40. The Special Rapporteur has also received allegations of more pervasive interference by the executive in the judicial process. During the mission, the Special Rapporteur was informed of allegations of "telephone law". These reports allege that judges are placed under direct pressure to decide certain cases in a particular way when the Government, at the national or local level, has an interest in the outcome of the case. For example, the Special Rapporteur has been informed about the case of Judge Yuri Sushkov of the Leninsky District Court in Bobruysk, who has stated publicly that in two cases he was placed under direct pressure from the executive. Firstly in 1998, in a case involving Bobruysk customs employees, he asserts he was placed under pressure from an investigator from the Mogilev State Prosecutor's Office, KGB employees, the local justice authorities and the president of the regional court, Judge Popenyuk. Secondly, in a case involving administrative proceedings against a Mr. Faletsky, he also alleges he was placed under pressure.

41. The Special Rapporteur is aware of another incident of direct pressure being placed upon judges. In his meeting with Justice Pastukhov, the Special Rapporteur was informed about an incident prior to the 1996 referendum, involving the Constitutional Court. Subsequent to a decision of the court overturning a presidential decree, the President called in all the judges of the Court, except for the Chairman of the Court, Justice Valery Tikhinya. The President waved a file at the judges and stated that he had compromising information on Justice Tikhinya and sought the support of the judges present for his removal. The President talked to the judges present for four hours and alleged that he had compromising information on other judges as well. The judges maintained their support for Justice Tikhinya.

42. The Special Rapporteur is surprised about the lack of concern shown by most judges met during the mission regarding these threats to independence, the non-observance of decisions of the Constitutional Court and the accumulation of power with the President.

2. Appointment

43. The November 1996 referendum substantially altered the procedures governing the appointment of senior judges in Belarus. Prior to the referendum, the Constitution required the

President to supply the Parliament with a list of candidates for election to the positions of Chairmen of the Constitutional Court, Supreme Court and Supreme Economic Court. The appropriate candidate was then elected by Parliament. All other judges on these courts were appointed by Parliament.

44. The amendments imposed by the referendum shifted the main responsibility for the appointment of judges to the President of the Republic of Belarus. The Constitution, in article 84 (8) and (9), now requires the President to appoint the Chairpersons of the Constitutional Court, Supreme Court and Higher Economic Court and all other judges of the Supreme and Economic Courts, with the consent of the Council of the Republic. According to article 84 (10), the President is solely responsible for the appointment of 6 of the 12 Constitutional Court judges and all other judges of the Belarusian courts. Article 98 (3) requires the Council of the Republic to elect six judges of the Constitutional Court.

45. Articles 7 and 56 of the law on the judicial system require the Chairpersons of the Supreme Court and Higher Economic Court to be selected by the Supreme Council of the Republic on the submission of the President of the Republic. Other judges on these courts are selected by the Supreme Council of the Republic. The Vice-Chairs of the Supreme and Economic Courts, the Presidents and Vice-Presidents of district and oblast courts are appointed by the President of the Republic upon the submission of the Minister of Justice and the President of the Supreme Court.

46. The procedure for the selection of judges is as follows. The selection of candidates for a judicial placement is undertaken by the local administration of the Ministry of Justice. A candidate then must pass a qualifying examination held by a judge's qualification board and be recommended for appointment by that board. If the Ministry of Justice accepts that recommendation, the candidate is referred to the Presidential Administration, which then makes the final decision concerning appointment. At this stage, candidates are also subject to confirmation by the Security Council of the Republic of Belarus.

47. Judicial examinations for district and oblast court judges are conducted by oblast level judges' qualification boards. According to article 70 of the law on the judicial system, a qualification board consists of representatives of the judiciary and of the organs of justice. The number of judges on the board is decided by the Conference of Judges, in agreement with the Ministry of Justice. The number of representatives of the organs of justice and the procedure of the qualification board are determined by the President of the Republic. The qualification board of the Supreme Court is selected by the Plenum of the Supreme Court.

48. During the mission, the Special Rapporteur spoke to various representatives of the judiciary and the Government regarding the procedures for the appointment of judges. All considered that the current provisions did not affect judicial independence. Many officials asserted that appointment by the President is consistent with practices in other countries. Whilst appointment by the executive or the legislature is not per se a violation of the independence of the judiciary, the procedure applied must contain appropriate safeguards. During the mission, the Special Rapporteur received many allegations that this process lacked transparency and was heavily influenced by political considerations.

3. Tenure

49. Article 63 of the law on the judicial system provides that judges in all courts are irremovable. They may not be transferred to another position or court without their consent, and their authority may only be curtailed in accordance with the law. Judges serve for an initial period of five years, after which their performance is evaluated by the Presidential Administration and, if it is found to be acceptable, they are reappointed for life. Similar to the initial appointment process, the local divisions of the Ministry of Justice are closely involved in evaluating candidates for reappointment. Article 72 of this law permits the removal of judges upon the expiry of their five-year term in office if an indefinite appointment is refused. Judges on the Constitutional Court are appointed for 11-year terms and may be re-elected for another term. Constitutional Court judges can only serve until 70 years of age.

50. Article 19 of the law on the judicial system provides for the use of judges for administrative issues and enforcement proceedings in district courts. Under article 62, any citizen of the Republic of Belarus aged 23 years, with a university-level legal education and whose behaviour has not discredited him, can be appointed to this position by the President for five-year terms. In Minsk City, these judges hear cases directly in police stations. The Special Rapporteur has been informed that there are 174 judges in such positions.

51. During the mission the Special Rapporteur was informed that judges with less than three years experience amounted to nearly 40 per cent of the entire bench, with approximately 15 per cent having been on the bench for less than one year. Less than 23 per cent of judges have been working as judges for over 10 years. This level of inexperience is symptomatic of the high turnover of judges.

52. Officials consulted during the mission asserted that the existence of the five-year initial appointment period did not constitute a threat to independence. Rather, it was a means of ensuring that only quality judges were appointed for indefinite terms.

4. Conditions of service

53. Article 76 of the law on the judicial system requires judges to be paid an amount that shall be sufficient to guarantee the independent performance of their judicial functions and which takes into consideration their qualification, grades and length of service. The official salaries of the Chair and Vice-Chair of the Supreme Court and Higher Economic Court should be set at the levels of the official salaries of the President and Vice-President of the Supreme Council of the Republic respectively. All other judges' salaries are set as percentages of the official salaries of the Chairs of the Supreme and Higher Economic Court.

54. Contrary to the requirements of this article, Presidential Edict No. 271 of 13 July 1995 set judges salaries as multiples of the rates payable to first-level judges. This edict was found to be inconsistent with the Constitution and Belarusian law by the Constitutional Court on 28 February 1995. Subsequent to this decision, Presidential Edict No. 625 of 4 December 1997 was passed, which stated that the salaries of the Presidents of the Constitutional, Supreme and Higher Economic Courts are set by the President personally. Other judges' official salaries are set as a percentage of those figures.

55. In addition to their official salary, judges can be paid up to 50 per cent of their salary every month as a bonus. The decision to award a bonus is based on agreement between the head of the Ministry of Justice at the oblast level and the president of the court concerned. The Presidential Administration decides on the bonuses for the higher courts.

56. Concern was expressed on many occasions by non-governmental organizations over the low level of pay for some judges. They stated that this exposed judges, particularly at the lower level to opportunities for corruption. The average level of pay for a judge on the District Court is estimated to be between US$ 30 and 45 per month. Judges on the Constitutional Court received US$ 150 per month.

57. The promotion of judges to higher levels is governed by Presidential Edict No. 35 of 1997. The relevant qualification board holds exams and recommends whether a person should be promoted to a higher grade. The President is responsible for the award of a higher grade. An increase in grade entitles a judge to a salary supplement. In accordance with article 63 of the law on the judicial system, judges cannot be transferred to another position or court without their personal consent.

58. An important element of a judge's conditions of service is the provision of adequate housing. The allocation of housing to judges who lack accommodation or are in need of better housing is provided for by article 76 of the law on the judicial system. Under this article, a judge, not more than six months after appointment or placement on the list of individuals requiring accommodation, is entitled to be provided with housing. The Special Rapporteur was informed during the mission that, with the current shortage of adequate housing, this obligation is frequently not respected and that many judges have to be conscious of the need for maintaining good relations with the local government or presidential administration to ensure the provision of housing. Further, in accordance with Presidential Edict No. 25 of 1997, judges' or prosecutors' houses (unlike those of other officials) are defined as official dwellings. Therefore, if judges are dismissed they immediately lose their right to government housing and are not provided with another dwelling. This presidential edict was made retroactive, contrary to article 104 of the Constitution.

5. Discipline and removal

59. Article 111 of the Constitution provides that the grounds for selecting or appointing judges and their dismissal are to be determined by law. Article 84 (11) empowers the President to dismiss the Chairperson and judges of the Constitutional Court, Supreme Court and Economic Court in the order determined by the law and with notification to the Council of the Republic.

60. Article 63 of the law on the judicial system states that a judge's authority may be curtailed only on the grounds specified and in accordance with the procedure laid down by the act. Article 72 provides that judges may be stripped of their authority for knowingly breaking the law or for demeaning conduct incompatible with their position, or when a court judgement convicting them of an offence becomes enforceable. This can only be done through a decision of the body that appointed them.

61. Judges may be relieved of their functions on the following grounds: if their state of health prevents them from continuing to work; upon selection for or appointment to another position, or transfer with their agreement to other work; upon the expiry of their five-year term of office as a judge if an indefinite appointment is refused; if a judges' qualification board concludes that further service as a judge is not possible; at their own request; or if they lose Belarusian citizenship. This decision shall be taken by the body that selected or appointed them, due regard being given to the findings of a judges' qualification board in the specified instances.

62. Article 73 provides that the grounds and the procedure for disciplinary proceedings against judges shall be defined in the regulations on the liability to disciplinary proceedings of judges. These are set out in Presidential Edict No. 626 of 1997. The grounds for discipline are: breaking the law in the consideration of cases; an occupational misdemeanour; and failure to observe the work rules, in which case the judge is called to account by the head of the court. Disciplinary proceedings can be brought by: the President of the Supreme Court against all general court judges; the Minister of Justice against all general and economic court judges other than judges of the Supreme Court and Higher Economic Court; the presidents of all courts equivalent to the oblast level against judges of the lower courts; and the head of the appropriate organ of justice against judges at the district level. The President can institute proceedings against the Chairpersons of the Supreme Court and Higher Economic Court. Disciplinary proceedings are conducted by a qualification board of judges in the presence of the judge concerned.

B. The procuracy

63. The Procurator's Office is governed by chapter 7 of the Constitution and the Procurator's Office Act. It is responsible for supervising the strict and uniform implementation of all laws and the execution of all court verdicts. The work of the office is directed towards ensuring the supremacy of the law and reinforcing law and order, so as to uphold the rights and freedoms of citizens and the legitimate interests of the State.

64. The office is an independent body that reports to the Supreme Council of the Republic, which monitors the office's work through a special monitoring commission. However, under article 127 of the Constitution, the Procurator-General is made directly accountable to the President. The Procurator-General is appointed by the Chamber of Representatives upon the recommendation of the President.

65. The Special Rapporteur has received many allegations of prosecutions being commenced or failing to be commenced for apparent political reasons. In March 2000, hundreds of demonstrators and journalists were assaulted and arbitrarily detained after assembling for a peaceful demonstration. Some of the demonstrated arrested, were found to have committed administrative offences and were fined up to between 20 and 30 times the average salary or sentenced to short periods of detention. These cases were heard by administrative judges, directly in the police station, on the basis of evidence provided by police witnesses. In these cases, the accused are only provided with legal representation if they request it. The procuracy failed to commence criminal proceedings against those responsible for the illegal actions. The

Special Rapporteur is also concerned about the prosecution of many leading members of the opposition in situations that connote a political motivation. Under Belarusian election law, those convicted of offences, whether of a substantial or a minor nature, are not permitted to run for public office.

IV. THE LEGAL PROFESSION

A. Lawyers

66. Article 62 of the Constitution guarantees the right to legal assistance. The chief function of the legal profession, in accordance with article 62 and article 2 of the Legal Profession Act, No. 2406 of 1993, is to provide qualified legal assistance to individuals and legal entities in the defence of their rights, freedoms and legitimate interests. Article 4 of the Legal Profession Act provides that everyone has the right to apply to a lawyer of his or her own choosing. There are approximately 1,500 lawyers practising in Belarus.

67. The conditions governing the exercise of legal activities were substantially changed by Presidential Decree No. 12 of 3 May 1997 on "Measures to improve the operation of the legal and notarial professions in the Republic of Belarus". Prior to the entry into force of this decree, advocates were able to become members of the collegium of advocates or could form private organizations of advocates. Article 1.4 of the decree and article 13 of the Act on the Legal Profession now provide that the legal profession may only be exercised by persons belonging to an oblast-level or Minsk municipal bar association. Advocates have access to clients in pre-trial detention and can represent them in criminal court proceedings.

68. Other legally trained persons can practise in law firms that are specially licensed by the Ministry of Justice, but are not able to appear in criminal court proceedings. These legal firms' activities are restricted primarily to contractual work.

69. Prior to becoming a member of a bar association, an individual must have attained a university-level legal education and have at least three years' working experience, or have followed an on-the-job training programme of between six months and one year. Subsequent to this, a candidate must complete an examination held by the Lawyers' Qualification Commission. Upon the recommendation of this commission, a candidate's application is then forwarded to the Ministry of Justice for a final determination on the granting of a licence. The decision of the qualification commission is not binding. If the Ministry of Justice approves of the candidate, a five-year licence is issued.

70. Upon the expiry of the five-year term, an application must be submitted to the Ministry of Justice for renewal. An application must be accompanied by an attestation from the applicants bar association stating that the applicant has been complying with the legislation governing the legal profession. To obtain a licence, a fee equivalent to 10 times the standard minimum wage must be paid. This five-year licence term, by article 1.2 of the 1997 decree, was deemed to apply to all licences issued prior to entry into force of the decree.

71. The activities of the Lawyers Qualification Commission are governed by the 1997 Regulations of the Lawyers Qualification Commission. The Minister of Justice appoints members of the Lawyers Qualification Commission for three-year terms. The Commission is chaired by the Deputy Minister of Justice and consists of no fewer than nine persons, including representatives of the courts, experts in law, representatives of State bodies, including the security services, and not less than four representatives of the legal profession. Prior to Decree No. 12, the Commission consisted only of lawyers and had only one representative of the Ministry of Justice. The Commission uses the stamp and the seal of the Ministry of Justice.

72. Under article 19 of the Act on the Legal Profession, lawyers are subject to disciplinary measures for contravening the act and the standards of professional ethics. Disciplinary proceedings shall be commenced by a motion of the Ministry of Justice based upon a complaint from any interested party. The proceedings are conducted by the professional bodies of the legal profession. A licence to practise as an advocate may also be suspended if an advocate takes up judicial or other State activities or moves to another organization, enterprise on institution, or enters full-time education. The Minister of Justice has a separate power to suspend a licence for one month for a breach of legislation or professional ethics, or for another misdemeanour.

73. The Ministry of Justice has other substantial powers over the legal profession. It can, inter alia: issue regulations, in accordance with legislation, to govern the activities of advocates; suspend decisions of the governing body of advocates that are not in keeping with the legislation and submit a motion to annul a decision of that body; exercise other powers in connection with the overall and methodological governance of the legal profession; and monitor compliance with legislation by all advocates.

74. The Ministry of Justice informed the Special Rapporteur that Decree No. 12 of 1997 was necessary to ensure that all advocates are members of one organization, so there can be uniform control over assistance to the poor. A five-year term was required to ensure that advocates continued to improve the quality of their legal service. For example, if advocates do not appear in court, they should be disbarred. It is also necessary that the Ministry of Justice control disciplinary proceedings, as advocates will be reluctant to discipline each other.

75. All advocates met with during the mission expressed significant opposition to Decree No. 12 of 1997 and considered that it interfered with the independence of the bar. Concerns were also expressed over the presence of non-lawyers on the lawyers' qualification commissions and the control that the Ministry of Justice exercises over the conduct of the qualifying exams, licensing and renewal.

76. Representatives of the Minsk Bar Association and the National Bar Association drew attention to the fact that the five-year licence period had not been introduced upon the recommendation of any of the bar associations of Belarus. They also expressed concern over the requirement for an attestation from an advocate's bar association for renewal of a licence to practise. It was not considered necessary to gather information on every advocate every five years. If the purpose of the attestation was to ensure that advocates had not contravened the laws on the legal profession, this would be more appropriately achieved on an individual basis, through disciplinary proceedings.

77. Some advocates allege that they are continually subject to harassment and interference with their legal activities. Several advocates whom the Special Rapporteur met during the mission alleged that they had been given warnings by their bar association because they had asserted that their client was not guilty, or had challenged the legality of the court proceedings.

78. Ms. Galina Drebizova, Chair of the Belarusian Association of Women Lawyers and an outspoken advocate of an independent bar, was paid a fee for services rendered to one of her clients. The Procurator brought a case against her, alleging that the fee was not warranted and was a secret way of funding the opposition. She had paid taxes on the amount. Her case went to trial in June 1998 and the appeal process was completed in 1999, when the court found in her favour. During the trial, her innocence was affirmed by her client and by a large number of other lawyers.

79. During the mission, the Special Rapporteur met Ms. Vera Stremkovskaya, President of the Centre for Human Rights in Belarus and a leading attorney, who has been targeted for her role in defending clients in politically sensitive cases. In 1999, Ms. Stremkovskaya was the subject of two criminal proceedings connected with the defence of her client, Mr. Staravoitov, a former official in President Lukashenko's Government. Whilst acting in defence of her client, Ms. Stremkovskaya questioned a prison doctor's experience and qualifications in order to secure her client's release from pre-trial detention on medical grounds. As a result, a criminal libel complaint was lodged against her. The lead prosecutor in the case also lodged a criminal libel complaint, after Ms. Stremkovskaya questioned whether the prosecution had mishandled evidence. The criminal libel trial is still ongoing. She had been warned on previous occasions to choose between her support for human rights and the practice of law. In May 2000, the premises of the Centre for Human Rights were broken into and computers, photocopiers and documents were stolen. An investigation is still continuing. Around the same time, the offices of another well-known human rights lawyer, Oleg Volchek, were also broken into.

80. The Special Rapporteur also met Gary Pogonyailo, Vice Chair of the Belarusian Helsinki Committee. Mr. Pogonyailo was disbarred in 1998 for allegedly disclosing details about a criminal investigation in one of the cases in which he was acting as defence counsel. The details of the investigation into his client were asserted by the Government to be secret. Mr. Pogonyailo was disbarred immediately following his defence of journalists Pavel Shemeret, Yaroslav Ovchinnikov, Dmitry Zavadsky in a high-profile court case. Mr. Pogonyailo is still unable to practise as an advocate in Belarus, despite holding a licence to practise law in Russia, which entitles him to represent clients in criminal proceedings in Belarus.

81. The Special Rapporteur has received other information regarding the harassment of lawyers. Olga Zudova represented the former Minister of Agriculture, Vasily Leonov, during his trial for bribery and large-scale embezzlement. During that case, the Procurator repeatedly requested the commencement of an investigation by the Ministry of Justice against Ms. Zudova, after she challenged certain procedural irregularities. She was warned by the Belarus College of Advocates not to cause trouble. Ms. Zudova stated during her meeting with the Special Rapporteur, that she had met with the Deputy Minister of Justice, who had asserted that he would try to protect her, but that if the Presidential Administration complained there was nothing that he could do.

82. Nadezhda Dudareva was disbarred in 1998 for an alleged breach of the lawyers' professional code of conduct and for failing to appear before the Qualification Commission. Ms. Dudareva had announced her intention to publicize several violations of human rights that had occurred in the trial of one of her clients. The judge in the case considered that this constituted an insult to the court and ordered the instigation of criminal proceedings. Although the proceedings against Ms. Dudareva were discontinued, the procurator's office sent a letter to the bar association claiming that she had violated the code of conduct. She was disbarred for failing to appear before the Qualification Commission owing to other court commitments.

83. Myacheslav Grib was disbarred in July 1997 after being required to take a requalifying examination as a result of Presidential Decree No. 12 of May 1997. Mr. Grib had been convicted for organizing a march on the third anniversary of the Constitution, contrary to Presidential Decree No. 5 of 1997.

B. Notaries

84. Until 1993, all notaries in Belarus worked for the State Notarial Office. In 1993, the Supreme Soviet, based on the Concept for Judicial and Legal Reform, introduced private notarial practice for one year as an experiment in Minsk. Private notaries performed the same notarial functions as State notaries and collected a fee equivalent to that of State notaries, with which they were to cover their expenses and the relevant taxes. The experiment was considered to be successful and, in 1994, the private notarial practice was extended to operate over the whole country until the enactment of a new law governing the notarial service.

85. In 1997, the above-mentioned Presidential Decree No. 12 also changed the regulations regarding notarial practice. Instead of collecting a fee, private notaries now collected the State duty plus a notarial tariff to pay their other expenses. The decree also suspended the issuance of new private notarial licences. At the same time, the President issued Instruction No. 135 to the Security Council of Belarus and the Committee of State Control to find ways of recouping the money that private notaries had earned during the experiment. Despite concerns over the legality of such a measure, State procurators brought actions to recover some of the notarial fees in 1997.

86. On 23 January 1998, the Constitutional Court declared that the decisions of the Government in 1993 and 1994 with respect to private notary practice were void and instructed the competent authorities to address the issue of reapportionment of State duty. In doing this, government officials were to take into account the responsibility of the State for failing to enact the appropriate legal regime.

87. In response to this decision, the President issued Edict No. 289 of 1998 requiring private notaries to pay back all fees collected between 1993 and 1997, with no allowance being made for expenses or taxes paid during that period. The edict required all fees to be paid back by 1 July 1998. An interdepartmental commission, consisting of representatives of the Ministry of Justice, the Ministry of Finance, the Security Council of Belarus and the Committee of State Control, was established to determine the amount that was required to be paid back by private

notaries. The individuals concerned were required to sign a voluntary undertaking to return the money that they had earned during that period, or otherwise face judicial proceedings. The decisions of this commission concerning the amount of money owed were declared to be final and binding on all State bodies.

88. The Special Rapporteur has learnt that threats were made to notaries and their families in order to force them to sign the voluntary undertaking to repay. The Special Rapporteur is also concerned about numerous procedural irregularities that occurred during the hearing of these cases. Some of the cases that challenged decisions of the interdepartmental commission were heard by "acting interim judges". Such a judicial position is not provided for by Belarusian law and cannot be seen to be independent. The Special Rapporteur has been informed that in one case involving a private notary the acting judge was named as a full judge 11 days after the decision in the notary's case. Further, the courts in these cases were precluded by the final and binding nature of the decision of the interdepartmental commission from determining the accuracy of the amount owed. This is clearly an interference in judicial procedure.

V. THE STATE OF THE LAW

89. The 1996 amendments to the Constitution substantially increased the powers of the President of the Republic. Article 85 of the amended Constitution allows the President to issue decrees and orders, on the basis of and in accordance with the Constitution, which are binding within Belarus. Article 85 identifies three kinds of presidential acts: decrees, orders and instructions. Further, article 97 permits the President to submit a draft law for the amendment or alteration of the Constitution and article 99 grants him the right of legislative initiative.

90. Article 101 permits the Chamber of Representatives and the Council of the Republic, on the proposal of the President, to adopt a law, supported by the majority of the full composition of both chambers, which delegates to the President powers to issue decrees that have the force of law. The scope and terms of the powers will be determined by that law. Decrees issued under a delegated power cannot be retroactive. Article 101 further provides that the President, in instances of necessity, may issue temporary decrees that have the force of law. These decrees are then submitted for approval to the Parliament within three days of their adoption and remain valid unless they are rejected by a majority of no less than two thirds of votes of the full composition of both chambers of Parliament. Article 137, paragraph 3 states, "in the case of a discrepancy between a decree or ordinance and a law, the law applies if the powers for the promulgation of the decree or ordinance were provided for by the law". Therefore, in the event of an inconsistency, decrees issued under a delegated power are subordinate to the law. However, decrees issued under the "necessity" power, not being issued under a law, prevail over existing laws.

91. The First Deputy Minister of Justice, Mr. Galavanov, expressed the view during the mission that the presidential power to issue decrees was essential, as the passing of laws through Parliament often took a long time. He said that the decree-making power could be used when quick work was required and that the content of the law was more important than its form. The Deputy Minister was not concerned whether it was the President or the legislature that passed laws.

92. The Special Rapporteur was also informed during the mission that prior to the 1996 referendum the Constitutional Court had found 17 decrees of the President to be unconstitutional. The new Constitutional Court has yet to find unconstitutional any of the estimated 43 decrees and 787 edicts which have been issued since 1996. Further, the Special Rapporteur was informed by the Constitutional Court that all of the decrees issued by the President have been based on the "necessity" power; however, as yet, no definition of that term has been promulgated, by the Constitutional Court or in legislation.

93. Article 8 of the Constitution acknowledges the supremacy of the universally recognized principles of international law and obliges the Republic of Belarus to ensure that its laws comply with these principles. The Special Rapporteur is greatly concerned about the non-compliance of many Belarusian laws with international norms and the seeming impunity by which these norms are violated.

94. The Special Rapporteur noted one particularly worrying example of the use of the President's power to issue temporary decrees. Presidential Decree No. 40 of 23 November 1999 on "Measures regarding harm carried out against the State" allows for the confiscation of property in cases of suspicion by the President of harm committed against the State by an individual or legal entity. In such cases the property is taken by the Ministry for State Property and Privatization "if something different is not established by the President". The confiscation of the property may be appealed to a court, which may return the property or its monetary equivalent. Confiscation of property without a court decision is in violation of article 44 of the Constitution and international human rights norms.

VI. APPLICABLE INTERNATIONAL AND REGIONAL STANDARDS

95. The following international and regional standards are relevant:

(a) Basic Principles on the Independence of the Judiciary;

(b) Basic Principles on the Role of Lawyers;

(c) Paragraph 27 of Part I of the Vienna Declaration and Programme of Action of 1993;

(d) Guidelines on the Role of Prosecutors;

(e) Council of Europe minimum standards in paragraph 1.3 of the European Charter on the Statute for Judges of 1998;

(f) Budapest Conclusions on the Guarantees of the Independence of Judges - Evaluation of Judicial System of 1998, in particular paragraph 3.

96. Principle 10 of the Basic Principles on the Independence of the Judiciary states:

> "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall

safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory."

97. General Principle 1.3 of the Council of Europe European Charter on the Statute for Judges states:

"In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary."

98. Paragraph 3 of the Budapest Conclusions on the Guarantee of the Independence of Judges - Evaluation of Judicial Reform, of 1998, provides:

"The independence of judges must provide in return a system of disciplinary responsibility, guaranteeing the citizen an efficient and competent judicial power. This responsibility should be exercised according to procedures which ensure sufficient guarantees for the protection of individual rights and freedoms of the judge, following the rules laid down in Article 6 of the European Convention of Human Rights, by an independent authority, consisting of renowned judges. Dismissal or compulsory retirement, except for health reasons, should only be carried out on the basis of disciplinary procedures, which allow the possibility to appeal."

99. Paragraph 27 of Part I the Vienna Declaration and Programme of Action of 1993 provides:

"Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development. In this context, institutions concerned with the administration of justice should be properly funded, and an increased level of both technical and financial assistance should be provided by the international community. It is incumbent upon the United Nations to make use of special programmes of advisory services on a priority basis for the achievement of a strong and independent administration of justice."

VII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

100. The Special Rapporteur acknowledges that Belarus is a country in transition and suffers heavily from economic deprivation and the after-effects of the Chernobyl accident. However, the pervasive manner in which executive power has been accumulated and concentrated in the President has turned the system of government from parliamentary democracy to one of authoritarian rule. As a result, the administration of justice, together with all its institutions, namely, the judiciary, the prosecutorial service and the legal profession, are undermined and not perceived as separate and independent. The rule of law is therefore thwarted.

101. Parallel legislative powers given to the President to legislate by decree in exceptional situations has lead to unbridled rule by presidential decree. The argument that such power to legislate is essential as the passing of laws through the parliamentary process takes a long time is untenable. It negates the very principle of the separation of powers, which is the core value for the rule of law.

102. The Government appears not to have any regard for its commitments to the international human rights treaties it has ratified, which have supremacy over domestic laws.

103. The Special Rapporteur is deeply concerned that the 1996 referendum proceeded contrary to the rule of law and in violation of the independence of the judiciary. According to article 129 of the 1994 Constitution, decisions of the Constitutional Court are final and not subject to appeal. Principle 4 of the Basic Principles on the Independence of the Judiciary states: "There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law."

104. The Constitutional Court is the body entrusted with interpreting the Constitution; the other organs of government are obliged to follow its decision. The blatant disregard for the decision of the court undermines the rule of law and the balancing role that the judiciary plays as the third power of government. Decisions of the Constitutional Court are mandatory and the nullification of a decision is, in effect, an interference in the judicial process.

105. Principles 17 and 18 of the Basic Principles on the Independence of the Judiciary state, respectively: "A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge" and "Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties".

106. The presidential edict removing Justice Pastukhov from office stated the grounds for removal as termination of his office. The Special Rapporteur is concerned that this ground was not provided for by article 18 of the Law on the constitutional court of the Republic of Belarus,

which governs the early termination of the office of a Constitutional Court judge. Further, the procedure specified in that provision, i.e. that the removal be based upon a recommendation of the Constitutional Court and performed by the national Parliament, was not respected. Section 84 (11) of the Constitution only permits the President to dismiss judges of the Constitutional Court in accordance with the law. The President had no power to remove Justice Pastukhov under this law.

107. The other constitutional basis asserted for the removal of Justice Pastukhov does not seem to be supported by the alleged facts of the situation. The President's action cannot be justified under article 146, which sets out transitional provisions for the entry into force of the Constitution. The President specifically stated that the Constitution had only been amended by the referendum and that the changes did not amount to a new constitution. Further, the amendments did not terminate the existence of the Court, so there was no need to form a completely new court. The Special Rapporteur is concerned that not only was Justice Pastukhov removed without the appropriate procedural guarantees required by international standards and Belarusian law, but that his removal represented a clear attempt by the President to determine the future composition of the Court. Four other judges who did not resign from the Court were reappointed to the bench of the Court when it was reformed in January 1997.

108. Executive control over the judiciary and the manner in which repressive actions are taken against independent judges appear to have produced a sense of indifference among many judges regarding the importance of judicial independence in the system. Many appeared to be content with the flawed appointment, promotional and disciplinary procedures and service conditions. These procedures violate international and regional minimum standards for an independent judiciary.

109. The existence of an independent judiciary requires not only the enactment of legal provisions to that effect but full implementation of that principle in practice. Article 1 of the Basic Principles on the Independence of the Judiciary states: "The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary." The Special Rapporteur is of the view that the creation of an overseeing interdepartmental commission or direct interference in individual cases by government officials constitutes inappropriate and unwarranted interference in the judicial process. The Special Rapporteur also believes that the constant monitoring of the activities of the judiciary is intended to intimidate members of the judiciary into deciding all cases in line with the Government's wishes, rather than in accordance with the law and the evidence.

110. A judicial selection process should ensure that candidates are selected on the basis of objective criteria and should be seen by the wider public to do so, otherwise the independence of the judiciary will be compromised. In the light of these requirements, the Special Rapporteur has previously recommended that judicial selection processes be conducted by an independent judicial council. The Special Rapporteur considers that the placing of absolute discretion in the President to appoint and remove judges is not consistent with judicial independence. The Special Rapporteur considers that only a judicial selection process conducted by an independent judicial council can meet the twin requirements of impartiality and the appearance of impartiality.

111. The Special Rapporteur is particularly concerned about the procedure for appointing judges to the Constitutional Court. He considers that the placing of the power to appoint six of the Constitutional Court judges within the sole discretion of the President constitutes a threat to the independence of the Court. There is no requirement in this selection process for the President to engage in consultations with members of the judiciary or the wider legal community in order to ascertain the most appropriate candidates. The procedure lacks transparency and is not based on clearly defined, publicly available criteria. The President also appoints the Chairperson of the Constitutional Court, who plays a role in nominating candidates for the other six judicial positions on the Constitutional Court. This further increases the President's influence over the composition of the court. The absolute nature of the President's role in the appointment of judges to the Constitutional Court means that this court cannot possibly be seen to be independent of the executive.

112. Principle 11 of the Basic Principles on the Independence of the Judiciary states: "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."

113. Principle 12 of the Basic Principles on the independence of the judiciary requires that judges have guaranteed tenure. Principle 2 requires that judges be free to decide matters before them without any improper influences, inducements, pressures, threats or interferences, direct or indirect. The length of tenure will play a decisive role in ensuring this, as too short a tenure will subject judges to pressures arising from the reappointment process. These pressures are amplified by placing the power of reappointment under the control of the executive, as the executive will frequently appear before the courts as a party or have an interest in the outcome of proceedings decided by the judges. The Special Rapporteur has previously concluded that a five-year tenure is too short to be consistent with judicial independence and courts in other jurisdictions have expressed similar opinions.

114. The substantial number of inexperienced judges compounds the problems associated with a short initial tenure. Many of the persons met during the mission expressed concern that the significant numbers of inexperienced judges, their poor conditions of service and their dependence on the Government threatened the independence of the judiciary and exposed judges to pressure and opportunities for corruption.

115. The conditions of service of the judiciary are not adequately provided for by law. The low level of salaries and the dependence of judges for promotions and other minimal service conditions on the executive and the Presidential Administration compromise judges' ability to decide cases independently. The low level of salaries also exposes the judiciary to opportunities for corruption. The judiciary should be assigned priority in the State budget. Although the Special Rapporteur realises that Belarus is a country in transition and suffers from severe economic problems, certain minimum standards are necessary for a State to be based on the rule of law.

116. Similarly there is excessive executive control of the legal profession, particularly by the Ministry of Justice. Such control undermines the core values of an independent legal profession and the Basic Principles on the Role of Lawyers. Such control leads to abuses that result in allegations of harassment, intimidation and interference by the executive.

117. In this regard, the Special Rapporteur is concerned about the targeting of certain advocates for the defence of their clients. The prosecution or threat of prosecution of advocates for professional activities contravenes the Basic Principles on the Role of Lawyers. Principle 20 provides that "lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral proceedings or in their professional appearances before a court, tribunal or other legal administrative authority".

118. The Special Rapporteur considers that the persecution of these advocates for their human rights related work is a violation of the right to freedom of expression. Further, it violates principle 14, which states: "Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently, in accordance with the law and recognized standards and ethics of the legal profession."

119. The independence and integrity of prosecutors is also undermined by excessive executive control. This leads to serious allegations of prosecutions being commenced or failing to be commenced for apparent political reasons inconsistent with the Guidelines on the Role of Prosecutors.

B. Recommendations

120. With regard to the Constitution:

(a) The controversial 1996 Constitution must be reviewed and the excessive executive powers of the President removed. This will restore the balance of governmental power between the three arms of government, in accordance with the doctrine of separation of powers. In particular article 84 (11), vesting in the President the power to dismiss the judges of the Constitutional Court, Supreme Court and Economic Court, must be repealed. Further, article 101, vesting in the President legislative powers "in instances of necessity", must also be repealed. In this regard, Presidential Decree No. 40 of 23 November 1999 and similar repressive decrees must be repealed with retrospective effect and any damage done to anyone in the enforcement of these decrees must be compensated. In the case of Parliament delegating to the President the power to legislate under the first paragraph of article 101, such delegation must be circumscribed to be strictly in accordance with the requirements of the article. The executive must remain accountable to Parliament, not vice versa;

(b) The Constitution and all laws must be seen to be in accordance with international treaties that the Government voluntarily ratified, in accordance with article 8 of the Constitution which provides for the "supremacy of the universally recognized principles of international law".

121. With regard to the judiciary:

(a) The Government must establish by law an independent judicial council for the selection, promotion and disciplining of judges, in order to conform with principle 10 of the Basic Principles on the Independence of the Judiciary, paragraph 1.3 of the General Principles of the European Charter on the Statute for Judges of 1998 and paragraph 3 of the Budapest

Conclusions on the Guarantees of the Independence of Judges - Evaluation of Judicial Reform. The executive may be involved in the formal process of appointment, but may not be otherwise involved in the selection, promotion or disciplining of judges;

(b) As judges who are appointed on probation do not have the requisite security of tenure that is so essential to ensure their independence, such a system of appointing judges on probation and the confirmation of permanent tenure should be under the exclusive control of an independent judicial council;

(c) The Government must ensure that the remuneration of judges and their conditions of service are adequate to maintain the dignity of their office, so as to enable them to dispense justice impartially;

(d) Judges must be sensitized to the concept of judicial independence, its values and principles, for the full realization of human rights, democracy and the sustainable development of the nation. To this effect judges should be given adequate training;

(e) The Government must abolish the interdepartmental commission established to monitor "high profile" criminal cases.

122. With regard to the procuracy:

(a) The Government must ensure that the prosecutorial system complies with the Guidelines on the Role of Prosecutors;

(b) Here again, the prosecutors must be sensitized concerning their duties and responsibilities with suitable training programmes.

123. With regard to the legal profession:

(a) The Government should enable lawyers to form self-governing associations and refrain from excessive control of the profession. There is no objection to the formation of a single unified profession as provided for by legislation. However, the controlling power must be a body composed in its majority of practising members of the legal profession;

(b) Lawyers must be allowed to practise their profession without any harassment, intimidation, hindrance or improper interference from the Government or any other quarter. In this regard, the Government should take note of its obligations under principles 16, 17 and 18 of the Basic Principles on the Role of Lawyers.

(c) Lawyers who were disbarred for upholding the rights of their clients and/or human rights generally should have their cases reviewed and be reinstated to the practise of the legal profession;

(d) Presidential Edict No. 289 of 1998, requiring private notaries to pay back fees earned by them, should be repealed and any monies recovered by the Government should be returned.

Notes

[1] Interfax News Agency, 30 October 1996.

[2] The First Congress of Judges of the Republic of Belarus. Documents and Materials, Minsk, 1998.

[3] "Panorama", 30 August 1999, quoted in O. Gulyak and G. Pogonyailo, "The courts and human rights".